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Ray J. Aiken, *"Subject to Financing" Clauses in Interim Contracts for Sale of Realty*, 43 Marq. L. Rev. 265 (1960).
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“SUBJECT TO FINANCING” CLAUSES IN INTERIM CONTRACTS FOR SALE OF REALTY

RAY J. AIKEN**

I. COMPONENTS OF THE PROBLEM

A. Practical Considerations

Certainly there is nothing either new or particularly worrisome in the fact that a high per centage of real estate purchasers, especially over the last decade, and especially in residential transactions, have found it necessary to finance a substantial part of their purchases. What is both new and worrisome, from a legal standpoint, is that this vital provision of the interim contract has ordinarily received such cursory attention from the parties, their brokers, and, occasionally, their lawyers as well. Seldom, if ever, does the clause relating to the purchaser's financing requirements spell out more than a short suggestion of the various considerations involved in modern mortgage financing. Indeed, it is as common to see the simple phrase, “subject to financing”, inserted randomly in the contract as it is to find any more definitive provision.

However ineptly the matter is phrased, however, its practical significance is inescapable: unless the intending purchaser can somehow raise a per centage of his purchase price on loan, using the property as security, the purchase and sale envisioned by the contract cannot conceivably be performed. In probably a majority of cases, only the scantiest investigation of the borrowing power of the purchaser has been conducted at the time of interim contract. With somewhat lesser frequency, but still quite commonly, there has been no current appraisal to determine the approximate security-value of the property. And—perhaps most universally of all—a vague set of unfounded preconcep-

*Based upon an address by the author before the Midwinter Meeting, State Bar of Wisconsin, Real Property, Trust & Probate Section, Feb. 20, 1959.

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tions is the best available indication of the repayment capabilities of the prospective borrower.

What is, in consequence, very commonly unrealized by the parties (if not by the brokers) is that "financing" is a term of broad scope, involving a multitude of complexities. There are, for example, the following minimum considerations:

1. What amount is sought to be borrowed?¹
2. What repayment rate, extending over how long a period of time, is contemplated?²
3. What interest rate, and what initial "service" or "discount" charges will be acceptable?³

¹ Specifying the amount in the statement of contingency may afford inadequate protection. In *Day v. Kerley*, 146 A. 2d 571 (Muni. Ct. D.C. 1958), the contract called for a \$13,000 G.I. mortgage, apparently to be arranged for by broker, with seller paying the prevailing discount and service charges. On broker's testimony that buyer had orally authorized him to obtain a \$12,000 loan, buyer was estopped, as against seller, from pleading the condition. Much the same result was produced in *Probst v. Di Giovanni*, 232 La. 811, 95 So. 2d 321 (1957), where a contract condition of \$35,000 financing at 6% over not to exceed 10 years was held waived by purchaser's letter stating that a \$32,000, 15-year commitment was acceptable. The case arose, however, because seller sought to plead the condition in defense of broker's action for commission. In *Zigman v. McMackin*, 177 N.Y.S. 2d 723 (1958), a seller's contention that purchaser was obligated to accept offered financing in any amount reasonably close to the stipulated "not more than \$10,000" was rejected. Louisiana strictly enforced the stated loan amount in *Savich v. Ruiz*, 32 So. 2d 415 (La. App. 1947). The contract was subject to a \$4,000 loan, and the lender to which application was made refused to approve over \$3,800. Seller offered to post additional security to bring the loan up to the contract amount. Purchaser held entitled to refuse, and to recover down payment. Much the same type of situation was similarly handled in *Antonini v. Thrifty-Nifty Homes*, 76 So. 2d 564 (La. App. 1955), and in *Slack v. Munson*, 61 So. 2d 618 (La. App. 1952).

No case discovered involves an attempted judicial construction of a "subject to financing" clause, lacking any statement of amount of mortgage intended, as to that particular feature.

² *Reese v. Walker*, 151 N.E. 2d 605 (Munic. Ct. Cincinnati, Ohio 1948), where the contract was "Contingent on securing necessary financing." Purchaser rejected a \$10,800, 6.6% 12 year loan, offered in response to his application for a 6% 15-year loan. "The clause would mean to a layman: 'If we can borrow the money we need to finance the purchase on terms we can repay...' Financing in its ordinary meaning connotes more than simply the face amount of a loan. It includes the interest rate, the term, the rate of repayment, and other terms and conditions. It means a loan on terms that the borrower can repay. Under the contract as executed, only the buyers can determine what financing they need. Having signed the contract without specifying what financing was 'necessary financing', the seller is in no position to complain if the buyers state they need a loan with repayments at a certain rate. . . ."

³ *Doerflinger Realty Co. v. Maserang*, 311 S.W. 2d 123 (Mo. Ct. App. 1958) was a suit by brokers directly against purchasers, who had countermanded payment on their earnest money check. The purchase offer was "subject to their ability to procure a cash loan . . . as per application for same now on file with Doerflinger Realty Co." The application in question specified a 5%, 20-year, \$20,000 loan; but agents of the broker emphatically insisted, in their conversations with purchasers, that 5% money was unavailable. There were evidences that purchaser's mother-in-law did not approve

4. Is the contemplated loan to be "conventional", or are FHA or VA loan guarantee benefits to be sought?⁴

5. What special security-protection provisions (tax and insurance reserves, mortgage life insurance, mortgage repayment insurance, ordinary or special acceleration provisions, etc.) are acceptable, and are they to be deemed part of the specified repayment rate?⁵

6. By whose effort is such loan to be arranged and procured; if by the purchaser's (with or without the broker's assistance), what potential sources of the money shall be applied to,⁶ and within what span of time?⁷

of the property, and purchaser himself cited his health as his excuse for withdrawal. Nevertheless, the court held the broker's oral statements that 5% money was unavailable to constitute an effective rejection of purchaser's application, defeating the condition precedent of the main contract, despite the fact that a commitment satisfying the application was obtained well in advance of the contract closing date. "Nothing in the sale contract required them to seek a loan elsewhere or under different terms or under a different application."

⁴ *Schwartz v. Baker*, 99 N.E. 2d 498 (Ohio Ct. App. 1950) is a somewhat enigmatic decision on an equally enigmatic clause: "\$6,900 cash, Bal. of \$11,000 thro (sic) FHA, this offer is subject to \$10,000 loan." The trial court received extrinsic evidence to the effect that purchasers intended to include non-FHA financing, since FHA guaranties were known to be unavailable on the transaction. On this proof, and the evidence that purchaser made no attempt to procure non-FHA financing, vendor was permitted to enforce the liquidation of damages against the earnest money deposit.

Equally obscure is *Johnson v. Graham*, 35 So. 2d 278 (La. App. 1948), where a contract "subject to my ability to secure a loan on the above described property in the amount of \$7,100" was alleged, in the pleadings, to have been intended to stipulate the prevailing terms for FHA loans. In any event, the purchaser applied for FHA loan guaranty, and the property was approved for only \$6,000. Purchaser then suggested, by letter, that vendor accept a second mortgage for \$1,100; and vendor responded with an offer to loan the entire \$7,100 on FHA terms. At this point, purchaser withdrew, and broker returned his deposit. The trial court dismissed the vendor's action against the broker on the theory that the contract contemplated third-party financing, not vendor-financing. The appellate court reversed, commenting that "The proviso . . . did not name any specific loan agency." It would probably have been more to the point to state that the proviso did not require that the loan pass FHA appraisal; and that, even had it done so, the purchaser's letter could constitute a waiver. The issue of substitution of vendor for third-party financing, however, is reserved for discussion below.

⁵ Aside from the purely practical consideration that such special security devices add materially to the cost of the loan, and may render it prohibitive, *Fry v. George Elkins Co.*, 162 Cal. App. 2d 256, 327 P. 2d 905 (1958) held that a purchaser was not entitled to reject offered financing simply because he objected to a 2% prepayment penalty clause, where his contract was "conditioned upon buyer obtaining \$20,000 loan at 5% for 20 years." Buyer evidently decided, after entering into the contract, to migrate to Hawaii. Noting this fact, and the fact that "It is a matter of common knowledge that the lending policies of different classes of financial institutions vary greatly", a trial court finding that buyer's application to two banks (ignoring the broker's suggestion that a savings and loan would consider the application) did not constitute good faith, was affirmed. Presumably, the only safe course is expressly to exclude special security devices in the statement of the condition.

⁶ *Kelley v. Potomac Development Corp.*, 81 A. 2d 81 (Munic. Ct. App. D.C. 1951), involved the failure to explicate, on a printed form of contract, which

party was to procure the financing. "(T)he purchaser is to assume, give, place, take title subject to, a first deed of trust secured on the premises. . . ." Decision: "We think the evidence permitted the trial court to conclude that the loan was to be obtained by the (purchaser)."

See also *Fry v. George Elkins Co.*, note 5, *supra*. *Hannah v. Yanke*, (unreported, Cir. Ct., Milwaukee County, Wis., 1957) ruled similarly on a case where purchaser applied to a savings and loan, was rejected on the ground that the property was insufficient security, and then withdrew. "This one effort to secure a loan does not sustain the (trial) court's conclusion that a bona fide effort was made to secure a loan." Suspect though they may be, the decisions demonstrate the hazard involved in failure to explicate the extent of search which will satisfy the contract. *Huckleberry v. Wilson*, 284 S.W. 2d 205 (Tex. Civ. App. 1955), involved a contract contingent upon procurement of a G.I. loan. Purchaser duly applied, certifying his intention to occupy the premises as a home; but, prior to any action on the application, purchased other premises, informing vendor that his property was unsatisfactory. On learning of this, the prospective lender cancelled the application. Trial court entered directed verdict for purchaser, in action to recover earnest money. Reversed. Issue for jury.

Considerable confusion appeared in the early Louisiana cases respecting the necessity of designating the sources of loan to which application should be made. In *Titus v. Cunningham*, 164 La. 431, 114 So. 86 (1927), the trial court held the condition "subject to homestead loan" potestative (i.e., imposing no mutuality of obligation), although *Morrison v. Mioton*, 163 La. 1065, 113 So. 456 (1927) had ruled that "subject to homestead loan to be granted by Orleans Homestead Assn." imposed an "inescapable duty" on purchaser to apply to that association for a loan, and was not potestative for that reason. No review of the trial court determination of the question in *Titus* was sought, but the appellate opinion seems to imply that the ruling was incorrect. Nevertheless, *Mathews Bros. v. Schoenberger*, 11 La. App. 155, 123 So. 133 (1928) holds that a contract providing "Terms \$6,000. cash, bal. thru homestead" is potestative, on the ground that it fails to designate whether buyer or seller shall undertake to procure the loan, citing *Titus*. *Decker v. Renaudin*, 10 La. App. 725, 122 So. 600 (1929) compounded the confusion by attempting to distinguish *Morrison* on the ground that there a particular lender was named in the contract. By the time of *Weingart v. Delgado*, 204 La. 752, 16 So. 2d 254 (1943), the confusion had apparently been resolved. The contract there named no specific lender, but carefully provided the terms of proposed loan "which loan the purchaser obligates himself to obtain if procurable." In *McPherson v. Warren*, 55 So. 2d 30, (La. App. 1951) the contract simply provided, "subject to loan." Purchaser applied to one bank, one building and loan association, and was refused by both. The court left at rest the overloaded question whether the contract was potestative, ruled it to be subject to a suspensive condition which had not occurred, and held that plaintiff had made diligent effort to comply. The common law equivalent of the civil law's "potestative" contract is the aleatory, or illusory, contract. The common law equivalent of the civil law "suspensive" condition is the condition precedent.

Callahan v. Siebert, 95 N.J.L. 243, 113 Atl. 914 (1920) construed the condition rather literally in purchaser's favor. "A further condition of this agreement being that the vendee is to negotiate either the reinstatement of the loan of \$5,000 in full in his own name from the present Building and Loan Ass'n. . . or to negotiate from some other association a mortgage of said amount under like conditions. . ." Purchaser applied to the existing mortgage-holder for reinstatement, which was approved only on condition that purchaser undertake to expend \$200 in repainting the building. He refused, but made no effort to procure financing elsewhere. On suit to recover down payment, the court ruled the provisions of the contract to be alternative, and held the purchaser not required to accept the obligation of repainting, nor to seek elsewhere for acceptable financing. It may have been significant that time was declared to be of the essence of the agreement, and only three days remained during which purchaser might have attempted to procure other financing. The decision does not specially comment on the point.

Doerflinger Realty Co. v. Maserang, *supra*, note 3, is the only case discovered in which a purchaser whose application to a named lender was refused was expressly relieved of any obligation to apply elsewhere. *Kovarik*

7. If a lender should indicate a willingness to make a mortgage loan, assuming that the interim contract specifies no minimum acceptable terms, may the purchaser refuse the offered loan on the ground that its terms are onerous, without violating the agreement (i.e., must the terms be "satisfactory to purchaser," "reasonably satisfactory to purchaser" or merely "reasonable")?⁸

v. Veseley, discussed at length in the text below, held that the named lending institution was not "of the essence," but did not affirmatively suggest a duty on purchaser to make further inquiry. Such duty, however, appears to be implicit in the decision, since the case suggests that the condition could be satisfied at any time prior to the stated closing date. In this respect, is *Sorota v. Baskin*, 334 Mass. 123, 134 N.E. 2d 428 (1956) distinguishable? The contract was there contingent upon sellers' ability to procure extensions of existing mortgages. Seller made one unsuccessful attempt to do so, and returned the deposit. "We hold that the defendants were not required as a matter of law to do any more than they did, and particularly they were under no duty to endeavor to procure the extensions up to the date of performance of the agreement."

Margolis v. Tarutz, 265 Mass. 540, 164 N.E. 451 (1929) and *Meyer v. Custom Manor Homes, Inc.*, 167 N.Y.S. 2d 112, App. Div. 2d 488 (1957) both demonstrate that a contract obligating the seller to procure the financing, but not specifying the extent of his required diligence, may involve seller in the same sort of difficulty. In both cases, seller assumed, erroneously as it developed, that the worst consequence of his lack of diligence would be return of the down payment.

⁷ The express time-allotment for procurement of financing has been enforced strictly, even in the absence of any provision declaring it "of the essence." *Masson v. Vella*, 94 So. 2d 454 (La. App. 1957) involved a loan approval issued one day after expiration of the 60-day procurement period. "Since the loan was unavailable during the contract period, this contract then became null and void." In *Hodorowicz v. Szulc*, 16 Ill. App. 2d 317, 147 N.E. 2d 887 (1958), the contract was conditional upon purchasers selling their house, and sellers were given an option to cancel if it was unsold by March 5, 1955. The sale was not effected until May, and purchasers repudiated the contract. Reasoning that the contract was initially unenforceable because of the precedent condition, and that sellers had an option of withdrawal after March 5, the court held that the contract lacked mutuality after March 5, and that "there was never a mutually binding and enforceable contract and agreement in effect between the parties."

The time-of-procurement limitation is one aspect of the condition which appears to be for the benefit of both parties. *Woodlark Const. Corp. v. Callahan*, 89 N.Y.S. 2d 67, 275 App. Div. 857 (1949); *Kenney v. Wedderin*, 220 La. 285, 56 So. 2d 550 (1951); *Baker v. Fell*, 135 Tex. 375, 144 S.W. 2d (1940). But the financing contingency itself is for purchaser's benefit only, and may be waived by him within the time limitation. *Nyder v. Champlin*, 401 Ill. 317, 81 N.E. 2d 923 (1948); *Morrison v. Mioton*, *supra*, note 6.

⁸ In *Antonini v. Thrifty Nifty Homes*, *supra*, note 1, the contract specified merely "ability of purchaser to borrow. . . \$6250 by mortgage loans or loan." A homestead Association refused to loan over \$4,000, but vendor offered to loan the difference at 8% for 1½ years. "We do not think plaintiff was obligated to accept. . . A fair interpretation of the contract . . . would be that the contract would be enforceable provided purchaser could secure the \$6250 loan on the usual and customary terms and conditions, to be repaid over a period of years, such as loans made by any homestead, the FHA, or other long term lending institution." *Lach v. Cahill*, 138 Conn. 418, 85 A. 2d 481 (1951), construed "mortgage in the sum of \$12,000" as meaning "suitable mortgage." Cf. *Reese v. Walker*, *supra*, note 2, which upheld the buyer's right to reject a variance of .6%, in interest rate, and 3 years in repayment period, without discussing whether such mortgage was "usual and customary" or not. The test there was stated to be buyers' determination in good faith "what kind of a loan they need," largely determined by "terms that the borrower can repay." The last-mentioned aspect arose in a different context

8. What is the consequence of a prospective lender's withdrawal, after tentative commitment, from his agreement to loan, assuming that neither party to the interim contract foments such withdrawal?⁹

To answer any of these important questions on the basis of an interim contract which merely recites that the transaction is "subject to financing" is to undertake an herculean feat of construction. Whenever it occurs, however, that one of the parties seeks to enforce the contract, and the other takes refuge in the indefinite financing "contingency", the only alternative to judicial construction of the clause is to declare the unenforceability of the sale, frequently in the face of an agreement that is in all other respects unmistakable in its provisions.

in *Real Estate Management, Inc. v. Giles*, 293 S.W. 2d 596 (Ct. App. Tenn. 1956), where a contract was "contingent upon buyer's being able to purchase" two tracts of land owned by third persons. The trial court held that buyer's failure to purchase the other tracts was due to his failure to offer a price for them which was both within his means and "within the bounds of reason," and therefore enforced the contract in favor of seller. In reversing, the court asked, rhetorically, "Did Freeman, a successful businessman, by using the words 'able to purchase,' have reference to his financial ability? Did he intend to unconditionally obligate himself to purchase the . . . tracts at prices he might consider excessive . . . Or . . . is it not reasonably apparent that (he) had reference to his being able to acquire the tracts at prices acceptable to him? The latter appears to be . . . the more logical and reasonable construction." *Kovarik v. Vesely*, discussed in the text *infra*, describes the right to select the terms of financing as being "left to the discretion of the buyers." Cf. *Callahan v. Siebert*, *supra*, note 6, where buyers were held justified in rejecting a loan because coupled with a \$200 repainting requirement; and *Fry v. George Elkins Co.*, *supra*, note 5, where buyers were held not entitled to reject a loan because coupled with a 2% prepayment penalty clause.

The impact of this problem upon the question of the bona fides of the purchaser in seeking financing is inescapable, and becomes the touchstone of the entire legal problem arising out of these clauses.

⁹ In *re King's Estate*, 183 Pa. Super. 190, 130 A. 2d 245 (1957) presented such a problem, but failed to resolve it because the plaintiff purchaser failed to plead or argue the point on either trial or appeal. The contract condition was "subject to the securing of a mortgage in the amount of \$5,500." A loan association approved an application conformably to the contract, but cancelled the application upon notification that Mr. King had died. At the attempted "closing," seller offered to take Mrs. King's note and mortgage. She sought return of the down payment on the theory that the contract was fatally indefinite, in that it specified no mortgage terms, and was unsuccessful. "It seems to us that the appellant would have been on more substantial grounds had she . . . directed her action at the recovery of the deposit on the basis of her inability to obtain financing. . . ."

A comparable, and more provoking circumstance arose in *Brandes v. Oram Constr. Corp.*, 158 N.Y.S. 2d 897 (1956). Purchaser had made application for a GI loan. While the same was pending, he withdrew it, stating that he had learned that he would require an operation, that his financial circumstances had taken a turn for the worse, and that he anticipated that his future income would be less than that stated in the application and insufficient to permit him to carry the loan. Seller challenged the action as a breach of the agreement. Held, for buyer. "He acted wisely and prudently in withdrawing the application." Cf. *Fry v. George Elkins Co.*, *supra*, note 5, where buyer decided that he would probably move to Hawaii; and *Kelley v. Potomac Development Corp.*, *supra*, note 6, where buyer's marriage plans apparently went awry. Suppose buyer simply performs a reanalysis of his future budgetary aspects, and informs lender that his original estimates had been over-optimistic? Is the buyer's assumption of his continued good health the only aspect of the matter which he may correct without penalty?

Cases may arise under such clauses, it is true, which are entirely too plain for argument. On the one hand, the "subject to financing" clause may spell out with uncommon attention to detail the particular financing requirements envisioned by the parties, specifically declare each element thereof as being "of the essence," and positively state that, unless each such element is satisfied, the agreement shall be null and void. Any litigable question arising under such a clause would necessarily be either a straight question of fact, or would arise under some aspect of the law of waiver or estoppel. On the other hand, regardless of the indefiniteness of the clause itself, it could occur that, after diligent inquiry, the purchaser would find it impossible to obtain any amount of financing from anyone on any terms whatever. In such cases, the only legal problem which can arise with respect to the clause is whether it should be construed to express a contingency at all, or whether it was simply inserted for some incidental purpose, not affecting the primary obligations to buy and sell.¹⁰

¹⁰ Inexpert draftsmanship of the clause occasionally suggests the applicability of Williston's rule: "... if ... (the parties) ... intend that the debt shall be absolute, and fix upon the future event as a convenient time for payment merely ... then the debt will not be contingent; and, if the future event does not happen as contemplated, the law will require payment to be made within a reasonable time." 3 WILLISTON, CONTRACTS, (Rev. ed.) §799, p. 2246. The rule was applied in *Noord v. Downs*, 51 Wash. 2d 611, 320 P. 2d 632 (1958), in permitting seller to collect on a demand note taken in lieu of earnest money, which expressed itself to be payable "on approval of loan to mortgagor by Lincoln Fed. Sav. for purchase of home etc." There appeared to be ample evidence in the case, however, from which the same result might have been reached on a theory of purchaser's waiver of the condition. The appellate court indulges in unabashed fact-finding when it says "... the reference to the approval was meant to fix a convenient time for repayment and not to embody a condition limiting the liability of the defendants." It is difficult to perceive, except in cases involving waiver of the condition by purchaser, how a reference to uncertain purchase-money financing could be intended as anything but a conditioning of the obligation. *Prima facie*, at least, that would seem to be the reasonable connotation of the reference. *Zucht v. Stewart Title Guaranty Co.*, 207 S.W. 2d 414 (Ct. Civ. App., Tex. 1947) is a thoroughly anomalous decision on the point, unsatisfactory mainly because the contract itself is not set out. Purchasers "contend that the contract ... was based upon a condition, to wit: the ability ... to borrow \$5,500 on the property ... at the interest rate of 5%. The so-called 'Earnest Receipt' does contain language that such loan was contemplated, but there is nothing in the receipt to indicate that such matter was made a condition precedent to the effectiveness of the contract." To the same effect is *Pegg v. Olson*, 31 Wyo. 96, 223 Pac. 223 (1924), where the contract provided that the balance of price, after down payment, was to be paid "as soon as C. S. Olson ... can get a loan through from the government ...". Substantially identical language relating to sale of purchaser's property, however, was held to express a condition precedent in *Biggs v. Bernard*, 98 Ohio App. 451, 130 N.E. 2d 152 (1954). Declaring that "The essential thing is for the court to look at the contract from the standpoint of the parties at the time they executed it, and the purpose they had in view in doing so," the Kentucky court, in *Hawkins & Chamberlain v. Mathews*, 242 Ky. 732, 47 S.W. 2d 547 (1932) ruled conditional a contract providing terms of payment "as follows: At least \$1,500 plus an amount of not less than \$6,000 obtained on loan in a building and loan association secured by a first mortgage, to be paid in cash; balance evidenced by notes bearing interest at 6% per annum ...". Buyers' down payment was returned when the \$6,000 mortgage could not be obtained. The closest ap-

These plain cases, however, are by no means usual. It may be wondered, therefore, why only a comparatively few cases involving the construction and effect of such clauses have reached our appellate courts.¹¹ The answer is largely a practical one. From the seller's standpoint, his primary aim is ordinarily to convert his property into cash as quickly as possible. Any attempt to enforce the contract, as by declaring the down payment forfeit under the liquidated damage clause, or by suing for damages or for specific performance, would necessarily thwart that primary objective over a protracted period of time. Furthermore, the "demurrage" which may be expected to accumulate over the period of litigation (taxes, insurance, upkeep, lost rents, heating, etc.) is frequently so substantial as to over-shadow completely a small down payment. While such elements of sellers' damages may be recoverable in a proper form of action, the difficulties of collection of such a judgment are usually obvious.

From the buyer's standpoint in any but the plain cases, the trouble and expense of litigation, especially up to the appellate level, will ordinarily not be justified by a nominal amount of "earnest money," which is all the buyer can hope to recover. In close cases, faced with the distinct possibility of sending good money after bad, the buyer will most often be inclined to negotiate rather than to litigate a solution of the dispute.

The ultimate practical decision, however, is most often that of the broker. By the prevailing rule, his commission is earned when the interim contract is executed, regardless of whether the transaction is ever consummated.¹² Whether or not the same rule obtains where the interim contract is itself subject to a contingency is a point that has not

proach to a Wisconsin determination of the question is *George v. Oswald*, 273 Wis. 380, 78 N.W. 2d 763 (1956). The contract there provided "\$1,000 tendered herewith, and \$6,000 more in cash on day of closing of sale, and the balance of \$10,000 to be paid on the day of closing of the sale of the buyers home . . . , which should take place in about ninety days." Apparently, the court treated the sale of the buyer's home as a method of fixing time of payment of the balance, rather than as a condition; but the case was complicated by several rather unusual circumstances, one of which was the fact that the closing date of the first sale was fixed very definitely in advance of the contemplated consummation of the second. Whether or not the same interpretation would have been placed on the agreement, absent this circumstance, is questionable, e.g. "\$1,000 tendered herewith, and the balance when sale of buyer's home is closed."

¹¹ For reasons only partially explicable by the practice of reporting intermediate appellate cases, Louisiana appears to be the only jurisdiction in which "subject to financing" cases have arisen with any degree of commonness. The reader of this article will note the comparatively paucity of cases from courts of final appeal.

¹² *Wauwatosa Realty Co. v. Paar*, 274 Wis. 7, 79 N.W. 2d 125 (1956) and numerous authorities there cited. See note to the case at 41 Marq. L. Rev. 202, however, suggesting that, under the terms of a common form of novation, broker is limited to half the forfeited earnest money where the transaction fails to close due to purchaser-default. The provision was present, but was not argued, in the cited case.

yet been clearly determined (though better reason would clearly suggest the negative);¹³ but, if the contingency can be successfully argued to have occurred, it seems clear that the commission has been earned. By the usual form of contract, the expenses and commission of the broker are given first claim against the earnest money deposit in the event of forfeiture.¹⁴ The result is that any litigation respecting the proper construction of the "subject to financing" clause will boil down, practically, to a quarrel between broker and buyer.

But practical considerations will ordinarily dissuade the broker from litigating such a question. In the first place, his client, the seller, will be inclined to take a dim view of such proceedings, because they involve the same practical handicaps to the seller's interests as were discussed above. In the second place, the broker is in no position to litigate the issue directly against the buyer. His claim for commission against the down payment is assertable only against the seller,¹⁵ who must, in turn, litigate the question against the buyer. Both of these circumstances will ordinarily be deemed to reflect so seriously upon the broker's business reputation as to deter him from recommending litigation, or from claiming commission, if his listing contract remains in force.

The result is that the construction of the "subject to financing" clause is most frequently determined by negotiation rather than by litigation. So long as the real property market continues to enjoy brisk activity, it may be expected that a claimed buyer-default, arising from inability to finance or from different causes, will not be uniformly enforced by litigation. The alternative of prompt and equivalent resale is entirely too promising.

But this comparative infrequency of litigation is little solace to the lawyer or judge who must deal with such a case. For his assistance, this paper will explore the various legal and practical complexities involved in the construction and operation of "subject to financing"

¹³ A number of cases seem fairly in point: *Biggs v. Bernard*, 98 Ohio App. 451, 130 N.E. 2d 152 (1954); *Probst v. Di Giovanni*, 232 La. 811, 95 So. 2d 321 (1957); *Shaper v. Gilkison*, 217 S.W. 2d 878 (Tex. Civ. App. 1949). It is apparent that neither buyer nor seller are obligated to pay commission on a conditional contract (assuming the condition to be precedent or "suspensive") if the condition does not occur, and that seller is so obligated if the condition does occur, but buyer nevertheless fails to "close" the transaction. But if buyer, by inaction, defaults his implied obligation to seek financing, can broker have any recourse against seller, except as specially provided with respect to defaulted earnest money? Presumably not. And, in such event, what is the theory of broker's case against buyer for lost commissions? Would *Mitler v. Associated Contractors*, 4 Wis. 2d 568, 91 N.W. 2d 367 (1958) suggest a possible basis?

¹⁴ Or provides for division of it between broker and seller, as pointed out in the note at 41 Marq. L. Rev. 202, cited *supra*, note 12.

¹⁵ See slight elaboration of the point at note 13, *supra*.

clauses, with primary emphasis upon the Wisconsin law applicable to the subject.

B. Legal Considerations

The legal problems presented by contracts of this type fall into three categories:

(1) Arguments concerned with the issue whether the clause is susceptible of construction at all;

(2) Problems of evidence, procedure, and "rules of construction";

(3) Problems of appropriate remedy.

In the first category, the specific questions most obvious for consideration are:

(1) Does such a contract, assuming some degree of failure to explicate the details of the financing contingency, satisfy the requirements of the statute of frauds?

(2) Regardless of the foregoing inquiry, is the contract sufficiently definite and certain to be enforceable, simply as a contract?

In the second category, such main questions arise as:

(1) To what degree are express statements of the details of financing "material" to the contingency?

(2) Which party—vendor or purchaser—has the burden of proof respecting fulfillment or nonfulfillment of the contingency?

(3) What varieties of evidence are competent on the question of the parties' intention in using the ambiguous language of contingency, and of what may judicial notice be taken?

In the third category, the following problems must be faced:

(1) To what extent is the liquidation of damages, customarily provided, enforceable, and by what means?

(2) Are equitable remedies, especially the decree of specific performance, available?

It is true, of course, that many of these questions raise legal problems of far broader scope and application than are immediately involved in the "subject to financing" clause. The same problems arise under an infinite variety of contracts, and their answers are strongly analogous if not identical in principle. But it is thought proper to include such considerations in this paper nevertheless, because the questions are of a sort which, though very commonly encountered, are seldom answered with any degree of definitive explanation. Further, they are questions which, while certainly not unique to the subject types of contract, arise almost universally in cases dealing with such contracts.

II. PROBLEMS OF THE FIRST CATEGORY:

ARE SUCH CONTRACTS SUSCEPTIBLE OF CONSTRUCTION?

A. *The Statute of Frauds*

A remark which can stand as a worthy candidate for the understatement of the year is that American jurisdictions are not uniform, either *inter sese* or *intra sese*, in their views respecting the statutes of frauds.¹⁶ In face of such confusion of thought, it is perhaps imprudent to venture a generalization of any kind on the subject. But, for purposes of economy of presentation, the writer will nevertheless do so. The statutes of frauds generally have been held to require that a contract for the sale of realty must be reduced to writing, at least to the extent of stating in such writing the "material elements" or "essential terms" of such contract.

The inevitable problem with such a rule, of course, is that there is little or no agreement on what are the "material elements" of a contract for purchase and sale of real estate. Quite obviously, the identification of buyer and seller, of the property, and of the price are material.¹⁷ But, commencing with the terms of payment or of credit,¹⁸ and proceeding thence through the various title-assurance provisions, the provisions for transfer of possession,¹⁹ and the special agreements respecting the rights on default, the contract involves a considerable number of points which are of less obvious materiality. Somewhere in this doubtful zone lies the "subject to financing" provision.

Let the issue be clear. If the "subject to financing" provision is a "material element" of the parties' agreement, the statute requires it to be expressed in writing; and a mere statement that the sale is "subject to financing"—without considerably greater detail—could no more satisfy the statute than could, for example, a statement that the sale was "for a price." The analogy just drawn, however, is not entirely free of objection as to its validity. Viewed in proper context, the two situations are dissimilar in one respect: the determination of the price

¹⁶ Annot. 23 A.L.R. 2d 164; 49 A.L.R. 1464.

¹⁷ *Harney v. Burhans*, 91 Wis. 348, 64 N.W. 1031, (1895); *Kelly v. Sullivan*, 252 Wis. 52, 30 N.W. 2d 209 (1947).

¹⁸ *Schmeling v. Kriesel*, 45 Wis. 325 (1878); *Buck v. Pond*, 126 Wis. 382, 105 N.W. 909 (1905); *Carlock v. Johnson*, 165 Wis. 49, 160 N.W. 1053 (1917); *Merten v. Koester*, 199 Wis. 79, 225 N.W. 750 (1929); *Kenner v. Edwards R. & F. Co.*, 204 Wis. 575, 236 N.W. 597 (1931); *Kovarik v. Vesely*, note 27, *infra*. Cf. *Swedish-American Nat'l. Bank v. Merz*, 174 N.Y.S. 600 (1914).

¹⁹ *May v. Lathers*, 257 Wis. 191, 43 N.W. 2d 15 (1950); *Kelley v. Ellis*, 272 Wis. 333, 75 N.W. 2d 569 (1956). Can the language of these two cases be reconciled? Can May be reconciled with *Long Inv. Co. v. O'Donnel*, 3 Wis. 2d 291, 88 N.W. 2d 674 (1958): The agreement in May contained the phrase "possession March 1, 1948." The court ruled, "It was an essential part of the agreement that (purchaser) was to have possession of the premises on that date." In *Long* the agreement provided that buyer was to pay the balance of purchase price "not later than July 1, 1953." He having failed to do so by July 13, 1956, seller resold the lands, and buyer sued for breach of con-

is a matter which concerns the undertakings of both parties to the contract, whereas the determination of the term "financing" is one which qualifies only the buyer's undertaking to pay the price—not the seller's undertaking to accept it as full payment.

The failure to appreciate this distinction has led often to the citation of cases out of point on the statute of frauds question here under discussion. It is frequently held that, where the parties have agreed that some part of the price may "stand upon" the land, the seller undertaking to supply credit to the buyer, the contract will violate the statute unless the details of such agreement are expressed in the writing.²⁰ To cite these cases, however, to a contract which envisions third-party financing, is to ignore a critical point. Where the vendor supplies financing himself, he is necessarily and directly interested in the terms of repayment, and such terms are even as necessarily part of his contract of sale. But where it is contemplated that a third person shall supply the credit, the vendor is utterly unconcerned with the terms of such credit.²¹ His right is to receive cash regardless.

Simply because the credit-sale cases above distinguished do not control the issue, however, is not sufficient to conclude that a "subject-to-financing" contract ipso facto satisfies the statute of frauds. It appears entirely competent to argue the ultimate question along either of two lines, productive (unfortunately) of opposite conclusions.

On the one hand, it can be reasonably argued that such a writing (assuming the omission of detail) fails to express a material element of the contract in that it fails to state with any degree of definiteness a condition which qualifies the purchaser's basic undertaking to buy. True, the condition is a collateral one; but equally-collateral conditions have been ruled indispensable in some cases. For example, a failure to express in the written interim contract the "release prices" under a proposed mortgage (i.e., the amounts for which the purchaser, giving a mortgage back to the seller for part of the purchase money, might procure release of selected parcels of the mortgaged lands without satisfying the entire mortgage debt) has been held to violate the statute of frauds.²²

On the other hand, it can be argued that the agreement of the parties simply did not include any mutual agreement respecting the details of financing, and that the interim contract, involving the identical omissions, was therefore a complete statement in writing of the agreement itself—which is all the statute requires. To the somewhat

tract! Time was declared not to be "of the essence." Perhaps "essential" and "of the essence" are not equivalent terms.

²⁰ Notes 16 and 18, *supra*.

²¹ Except to the extent of the time-of-procurement limitation, as pointed out at note 7, *supra*.

²² Carlock v. Johnson, cited *supra*, note 18.

separate argument that an incomplete contract reduced to an equivalently incomplete writing is unenforceable on two counts, the reply is that the details of the prospective third-party financing are not matters of contract as between buyer and seller; and their omission cannot, therefore, be said to constitute an incompleteness either of contract or of the writing.

The contract litigated in *Kenner v. Edwards R. & F. Co.*,²³ presents an interesting basis of analysis on the question. Buyer there agreed to buy subject to financing in a stated amount, to be borrowed against the property from a stated third-party lender, pursuant to loan negotiations in progress at time of contract. The details of the proposed financing, if they were in fact determined at the time, were unstated in the contract. The unusual feature of the transaction, as compared with the common "subject to financing" provision, was that the credit arrangements were to be made and concluded entirely by the seller, with the buyer thereafter taking the property subject to the resulting encumbrance, assuming the repayment obligation.

The members of the court were unanimous in holding the contract enforceable, as against a contention that the financing provision violated the statute of frauds; but the grounds for such decision were widely at variance as between the majority and Justice Owen, concurring. The majority opinion is difficult to understand, seeming as it does to suggest that the terms of financing were not an essential part of the sale agreement itself, but that those terms were "accessible" in the negotiations under way, and that they were incorporated into the contract by reference. Since it nowhere appears that the matters so incorporated by reference existed, at the time, in any written form, it is difficult to conceive how the statute of frauds could be satisfied by reference to negotiations which themselves lay in parol.

The concurring opinion, however, treated the question with greater simplicity and directness. "In effect," said Justice Owen, "the plaintiffs constituted the defendant their agent to negotiate this mortgage, without any limitation as to the rate of interest it should bear or the length of time it should run. This might or might not have constituted good business conduct, but it is not perceived why a person *sui juris* may not make such a contract and may not repose such confidence in another with whom he is doing business." And later, "I believe this to be a definite and enforceable agreement, but, whether it is or not, I am certain it is not void under the statute of frauds."²⁴

The translation of this principle into other cases, even into such closely similar cases as the common "subject to financing" clause presents, is not a process free of difficulty. The difficulty stems from the

²³ Cited *supra*, note 18.

²⁴ 204 Wis. 575, 589.

problem of fixing a limitation upon the principle itself. If agencies will be implied out of a failure to state any terms of contemplated financing, with the agent's power limited only by the details expressed, why would not a statement of price as "between \$30,000 and \$40,000" confer a like authority to use discretion, simply as between the parties. There would be no difficulty in authorizing an independent agent to buy in that fashion, but such an agent would be bound by the obligations of fidelity and account to his principal.²⁵ The same can scarcely be said of one who dons the mantle of agent in negotiating an aspect of a contract to which he is personally an opposite party.

Perhaps a better way of expressing the principle, therefore, would be to cast it in terms of option. The party in whom is rested the power to determine the unstated details of the financing could be said to have an option to fix those details to suit his preference.²⁶ So construed, there would seem to be no necessity of any written statement of such details, either in the interim contract, or in any document incorporated into it by reference or by legal artifact, or in any subsequently-executed form of writing, unless there be some corollary rule to the statute of frauds which would require that such power of determination be exercised in writing.

The final qualification, questioning whether or not such an option must be exercised by a writing conforming to the statute of frauds, has caused no little confusion and difficulty, especially in the decision of *Kovarik v. Vesely*.²⁷ That decision proceeded upon the complete assumption that, while the terms of the mortgage financing were "left to the discretion of the buyers" under the typical "subject to financing" provision, the statute of frauds would be satisfied only if the exercise of that discretion, by selecting definite terms, were not only written but "subscribed" by the "party to be charged." Nowhere in the decision is it suggested why either is necessary, though it is readily apparent, from the heavy reliance which the decision places upon *Crabtree v. Elizabeth Arden Sales Corp.*,²⁸ that considerable confusion clouded the mind of the court. The *Crabtree* case dealt with a contract which, by its terms, was not to be performed within one year; and applied a statute²⁹ which required a memorandum of such contract to be "signed by the party to be charged." The Wisconsin statute of frauds relating to contracts for sale of real estate³⁰ requires the memorandum to be "subscribed by the party by whom the . . . sale is to be made or by his lawfully author-

²⁵ 2 Am. Jur., *Agency*, §252, 253, pp. 203-4.

²⁶ *Reese v. Walker*, *supra*, note 2, so suggests, as does *Kovarik v. Vesely*, note 27, *infra*.

²⁷ 3 Wis. 2d 573, 89 N.W. 2d 279 (1958).

²⁸ 305 N.Y. 48, 110 N.E. 2d 551 (1953).

²⁹ N.Y. Pers. Prop. Law §31; the Wisconsin equivalent is §241.02 (1957).

³⁰ §240.08 (1957).

ized agent," and has been repeatedly construed as not requiring the signature of the purchaser at all.³¹

To speculate upon what rule underlaid the *Kovarik* decision is dangerous, but perhaps not unwarranted. It may have been the unspoken keynote of the case that, unless either the interim contract itself or some document legally a part of it states the terms of proposed financing, the contract fails under the statute of frauds. This would be equivalent to holding that such terms of financing are a material and essential part of the interim contract itself, which cannot be ordinarily omitted from the writing under the "option" theory, unless the option is itself exercised in writing. A second rationale of the case would be that the court did not deem it necessary to decide the indispensability of the financing terms to the writing, because the decision here finds the written statement of such terms to have existed. Yet a third speculative possibility is that the entire opinion on the question is sheer obiter, and that no written statement of the terms of proposed third-party financing is necessary under the statute of frauds, using the reasoning of either the majority or concurring opinions of *Kenner v. Edwards* as support for the conclusion.

None of the suggested hypotheses is free of very profound difficulty, even if regarded without the additional problems which *Kovarik v. Vesely* offered. The difficulty with the first hypothesis is that no reason or authority appears in support of the supposition that such discretion must be exercised in writing.³² It is difficult to see how the exercise of a purchaser's discretion to select terms of financing acceptable to himself can constitute either a conveyance or a contract to convey real estate; and it is even more difficult to imagine how, practically, such exercise could sensibly require the signature of the seller or buyer for its efficacy. Of course, simply by citing the *Crabtree* decision, the court seems to dispense with the latter problem; but that process plainly ignores differences in the statutory language.

The difficulty with the second and third hypotheses is that they find not a whisper of support in the language of the opinion itself, other than the simple citation of the *Kenner* case.

So the entire question remains disturbingly unsettled. It would seem that the clause ought properly to be treated as creating an option (or "discretion") to select terms, and that such option need not be exercised in writing. So interpreted, there would seem to be no serious doubt that the statute of frauds is satisfied by the common interim contract containing a "subject to financing" clause; although, with Justice

³¹ *Heins v. Thompson & Flieth L. Co.*, 165 Wis. 563, 163 N.W. 173 (1917); *Russell v. Ives*, 172 Wis. 123, 178 N.W. 300 (1920).

³² *Russell v. Ives*, *supra*, note 31, is direct authority to the contrary. It appears to state the general rule.

Owen, we may have grave misgivings respecting the business prudence of the party granting such an option.

This conclusion, so far expressed, suggests that a writing is *not* necessary either to define the terms of or to constitute an effective exercise of the option. It does not suggest, at this point, the propriety of holding that the mere act of *applying for* a loan on given terms constitutes a binding exercise thereof. This aspect of the problem shall receive later consideration.

B. Indefiniteness and Uncertainty

"An agreement in order to be binding must be sufficiently definite to enable a court to give it an exact meaning."³³ How does a promise to buy a certain piece of real estate, for a certain cash price, but "subject to financing", fit within this elementary rule?

We are not here speaking of the statute of frauds. We are ignoring what the parties wrote and signed, and speaking simply of what they in fact agreed to. Has their agreement an "exact meaning" or hasn't it?

Ignore the "subject to financing" clause and the question answers itself. But is it proper to ignore the clause, even if the entire contract must fail of enforceability if it is not ignored? Courts are often prone to dismiss problems of this sort simply by labeling the issue "collateral" or "nonessential." From an early day, equity has so regarded the "time of performance" provisions of certain contracts,³⁴ and with some justification. The doctrine of "substantial performance" has excused violations of this covenant and that, and again with some justification.

Whenever it is possible, by implication, construction, or other device, to supply a deficiency of the agreement with a reasonable degree of certitude, the courts will do so, rather than let the entire contract fall.³⁵

The essence, therefore, of the question here under discussion is not whether an agreement to buy "subject to financing" is indefinite, nor whether such indefiniteness is "substantial, material, or essential," but rather whether in the ordinary case an attempted judicial interpretation of the clause, supplying the missing detail, can achieve the requisite degree of certitude.

If the above-suggested option theory be adopted and applied, much of the problem of indefiniteness dissolves. If the right to determine the acceptable terms of financing be regarded as being utterly without limitation, then the definiteness of the extreme applies. But to label the

³³ WILLISTON, *CONTRACTS* (rev. ed. 1936) §37, p. 98; 1 *RESTATEMENT, CONTRACTS*, §32.

³⁴ Though hardly with any degree of consistency, as evidence note 19, *supra*.

³⁵ WILLISTON, *CONTRACTS*, (rev. ed., 1936), §37, p. 100; *Inglis v. Fohey*, 136 Wis. 28, 116 N.W. 857 (1908); *Taylor v. Bricker*, 262 Wis. 377, 55 N.W. 2d 404 (1952); *Kelley v. Ellis*, *supra*, note 19; *George v. Oswald*, *supra*, note 10.

privilege an unlimited one comes dangerously close to the line of illusory or aleatory contract, because the party holding the right to select terms has it within his power to name impossible ones, escaping his own primary obligation thereby.³⁶

The alternatives to this unsatisfactory principle are basically two:

(1) By close investigation of the detailed circumstances of the buyer, and of his statements and conduct throughout the transaction, limits of greater or lesser precision might be placed upon the amount and terms of financing which he presumably intended;

(2) Current practices in the community with respect to the financing of similar purchases might be resorted to.

Neither course is realistic, at least as applied to the ordinary case, because both ignore the essentially personal character of mortgage financing. The question is not, and cannot be, whether or not a 5% interest rate, on 15-year equalized payments, is "reasonable." Of course it is reasonable, simply as a general proposition. Nor is it the question whether or not the buyer could, or thought he could, "afford" to make such payments.³⁷ If he could afford them, it would only mean that he could not afford something else. To say that he has already committed himself to buy the particular property which is the subject of the contract, and has therefore made his choice, is to beg the question.

The basic quarrel with these forms of inference as applied to the buyer's financing requirements is that they declare a specific state of mind—a willingness to undertake a given repayment program—which in fact did not exist. The buyer's thinking on the matter is, with very rare exceptions, entirely tentative.³⁸ To translate such tentative and piecemeal thoughts into an integrated set of acceptable financing terms is to create by judicial fiat what the broker was unable or unwilling to create by sales persuasion.

Something of this process was present in *Kovarik v. Vesely*.³⁹

³⁶ The decision of *Reese v. Walker*, *supra*, note 2, is disarmingly vague in adding, almost as an afterthought, "Of course, buyers must show good faith . . . They must honestly determine what kind of a loan they need and must make a bona fide effort to obtain it." Is it any less honest of borrowers to determine that they need the now-extinct 4% loans than it is of lenders to determine that they need the now-current 6½% rates, with escalators, "service" points, and prepayment penalties superadded? Did Congress act in bad faith when it recently refused to authorize an increased interest rate on Government long-term borrowing, though loans at the old rates were largely unprocurable?

³⁷ See *Real Estate Management, Inc. v. Giles*, *supra*, note 8.

³⁸ There is a frank recognition of this fact in *Savich v. Ruiz*, 32 So. 2d 415, (La. App. 1947), cited *supra*, at note 1: "It seems to us that when a purchaser agrees to buy property under the conditions as contained in the agreement here, he does so for two reasons (1) to learn what appraisement would be placed on the property by the appraisers to re assure himself as to his bargain, and (2) so that he can secure sufficient finances to consummate the purchase . . ."

³⁹ Note 27, *supra*.

After declaring that the buyers there had a "discretion" to select acceptable terms of financing, the court declared, "However, when they signed the (mortgage loan) application to the Fort Atkinson Savings and Loan Association, and such application set forth the terms of the loan applied for, they had exercised such discretion and were bound thereby."

Some further explication of the facts of the Kovarik contract is now necessary. The contract was expressly "contingent upon buyer's ability to arrange . . . a \$7,000 purchase money mortgage from the Fort Atkinson Savings & Loan Ass'n." An application was made to said association, allegedly upon a form blank as to terms, but into which the Association's then-current interest rate, duration of loan, and tax reserve provisions were subsequently inserted. The Association formally denied the application,⁴⁰ but the seller verbally offered to finance the buyer's purchase on the same terms.⁴¹ The buyer rejected the latter offer, sued to recover his down payment, and was counterclaimed against for specific performance. Judgment for seller on his counterclaim was affirmed. Because "Kovarik's testimony stated no reason of any kind with respect to why the Kovariks preferred having the mortgage loan come from the Association rather than from the Veselys," the court held that the provision of the contract respecting source of financing was nonessential. With this last aspect of the ruling, dissenting Justice Fairchild took emphatic exception.

But what of the central problem? There can be no question but that buyer's initial decision to purchase was essentially tentative, expressly contingent as it was upon their ability to finance. In the practical realm, "ability to finance" is not simply a present ability to meet a

⁴⁰ On the ground that the property afforded insufficient security, under the association's appraisal.

⁴¹ This offer was not made until purchaser's demand for return of his very substantial down payment had been refused and both parties had placed the matter in the hands of attorneys. Both *Antonini v. Thrifty-Nifty Homes and Savich v. Ruiz*, *supra*, note 1, involved the same basic technique: that of vendor offering belatedly to supply, in one fashion or another, the financing which purchaser could not obtain from third parties. In *Antonini*, the court said, "The conclusion is inescapable that neither of the parties at the time of confecting the agreement entertained any idea whatsoever of carrying out the financing of the sale wholly or partly between seller and purchaser." Strangely, the case cites in support of the statement both *Savich v. Ruiz*, which seems to embrace the same principle, and *Johnson v. Graham*, *supra*, note 4, which enforced an offer of vendor-financing (under circumstances, however, strongly suggestive of waiver). It is entirely possible that *Johnson* was mistakenly cited to the trial court's finding: "The securing of a loan on property from a third person is not the same as the seller carrying the unpaid balance of price as a mortgage on the property." *Lach v. Cahill*, *supra*, note 8, is distinguishable on the ground that there vendor offered the unsuccessful loan applicant a purchase money mortgage payable on demand, or alternatively, vendor-procured third party financing on unspecified terms. Ruling that purchaser "required a mortgage payable in reasonable amounts over a period of time," and without directly passing upon the question whether vendor-financing could satisfy the contingency, the court ordered the earnest money returned.

stated monthly repayment schedule, or an isolated willingness to pay a stated rate of interest.⁴² It involves an extremely hazardous business judgment, on the part of both borrower *and lender*, no small factor of which is the security value of the property involved.⁴³

In this aspect, the significance of the loan application as an exercise of the buyers' discretion pales decidedly. The applicant does not *declare* that the loan is a feasible one. He simply inquires whether it is or not. The inquiry is, like the purchase agreement which prompts it, entirely tentative.

If the court's declaration be correct that the making of the application constituted a total decision to finance on those terms, it is to be wondered why the formal application was necessary at all. Why could not the officer of the Association who allegedly inserted the terms simply have testified to what terms he would have inserted had the buyers made application—to the lender's current terms, in other words? And if the business judgment of the Association that the loan was not a sound one, in which the buyers concurred, was to be disregarded as of no significance, then the "subject to financing" contingency bestows no greater discretion on a buyer—or even on a designated third-party lender—than can be supported with a recitation of reasons. Presumably, no "reason" is acceptable which tends to derogate from the general obligation to complete the purchase under the contract; and this would include the lender's basic judgment that the transaction was unsound from the overall point of view.

The upshot of the matter is that either the option of the buyer to determine the availability of sound financing must be interpreted as a broad one, both initially and subsequently, or else judicial judgment will have to be substituted for that of the buyer.⁴⁴ The sole remaining alternative is to permit the contract itself to fall for uncertainty. Of the three possible courses of action, the first one seems more appropriate, and to represent the prevailing view outside of Wisconsin.

III. PROBLEMS OF THE SECOND CATEGORY: WHAT RULES OF EVIDENCE, PROCEDURE, AND CONSTRUCTION ARE APPLICABLE?

A. The "Materiality" of Financing Details

A problem which will often be encountered will involve the judicial

⁴² Reese v. Walker, quoted to that effect at note 2, *supra*.

⁴³ Savich v. Ruiz, note 38, *supra*.

⁴⁴ What is worse, the judgment of the appellate tribunal is occasionally substituted for that of the trier of fact. The determination whether or not good faith is exercised by a prospective purchaser seems appropriately a question of fact under conflicting possibilities of inference. Huckleberry v. Wilson and Hannah v. Yanke, *supra*, note 6, appear to stand at opposite poles on the issue. Kovarik v. Vesely must, logically, represent the proposition that good faith requires a purchaser to ignore a designated lender's determination that the property has insufficient security value to support a loan. In the pur-

attempt to rationalize away express provisions of the "subject to financing" contingency on the ground that they were not "material" to the contingency itself. The prime illustration arose in *Kovarik v. Vesely*,⁴⁵ where the court ruled that the source of intended financing named in the contract was not intended to control. The ruling was based, apparently, upon the inability of the buyer to explain, in his testimony, any reason why he considered the matter important;⁴⁶ and was analogized to similar rulings on "time of performance" provisions in contracts generally. It was the opinion of Justice Fairchild, dissenting, that the ability or inability of the buyer to justify the provision by recitation of reasons was immaterial; and that, viewed objectively, there are many reasons why borrowing from a given lending institution might be materially preferable to borrowing from a seller.⁴⁷

The question here intended for analysis, however, is considerably broader in scope than the single matter of sources of financing. The draftsman of a "subject to financing" clause who seeks to avoid, as far

chaser's own judgment, such determination may have been a vital "term" of the loan on which the contract was conditioned.

⁴⁵ Note 27, *supra*.

⁴⁶ "Kovarik's testimony stated no reason of any kind with respect to why the Kovariks preferred having the mortgage loan come from the association rather than from the Veselys . . . The trial court could reasonably infer from the absence of any such testimony . . . that the words of the contingency clause . . . were intended to have reference to the ability of the buyers to finance the balance of the purchase price by means of a mortgage loan of \$7,000 on terms of their own choice, and that the source of such financing was not a material part of the condition." *Ibid.*, p. 583. The impact of the parole evidence rule on the problem is not discussed. Presumably, however, there underlies the foregoing statement a judicial presupposition that "\$7,000 purchase money mortgage from the Fort Atkinson Savings & Loan Ass'n" is an ambiguous provision of the contract, with respect to the source of the intended financing, because it fails to include the word, "only." Otherwise, the consideration of the extrinsic circumstances (especially those which did not arise until weeks after the contract) would seem inappropriate. Would the same reasoning be applied to a stipulation of the amount of loan, the interest rate, the duration, etc., if the word, "only" were similarly omitted?

⁴⁷ "Examples of such reasons are: That the buyer will feel more confident of his own judgment of the price he is to pay if a lending institution is willing to make a loan; that the buyer would rather have the matter, in the event of default, in the hands of an established lending institution than in the hands of an individual who might be less able, if not less willing, to adjust matters reasonably." *Ibid.*, p. 585. Consider the radically different bases upon which institutional financing and vendor financing are approved. An institutional lender must decline to loan, even under banking regulations, if the security value of the property is, in its judgment, inadequate; and such lender will also make an objective appraisal of the financial position of the applicant, refusing to loan if it appears probable that he will find himself in financial distress. To decline the loan costs the institutional lender nothing. But a vendor gives little or no attention to either of these factors. He finances the sale only because he wishes thereby to protect the strong benefit of bargain which he contingently achieved under the basic contract. Protected by his down payment, he has everything to gain and nothing to lose by offering the financing. Refusing it, he loses the sale. Why else do department stores, appliance dealers, auto dealers, and the rest offer "easy credit" which no institutional lender could or would duplicate? Mr. Kovarik's inability to deliver a professional dissertation on these distinctions apparently cost him dearly.

as possible, the indefiniteness of the usual provision may spell out precise specifications respecting the financing which will satisfy the contingency. In so doing he must walk a tightwire of speculation between the demands of the immediate parties' satisfaction and those of prospective lenders; and it is quite likely that offered financing will vary somewhat in terms from the contract specifications. The question will then arise: Is the variance sufficiently substantial or material to prevent fulfillment of the contingency?

The varieties of nonconformity between contract and offered financing which might be imagined are innumerable. The interest rate or service charge might be fractionally higher than the contract provision permits, special reserves might be required which are unprovided for in the contract, special provisions for acceleration or for prepayment penalty might be demanded, FHA approval might be conditional upon the making of certain repairs or renovations on the property, maintenance of mortgage life insurance might be insisted upon, "closing costs" might exceed the contract amount, repayment periods or interest-computation periods might vary from the contract specification, the loan-principal offered might be somewhat less than the contract specifies, etc. etc.⁴⁸

Insistence by the buyer upon the letter of the contingency in all such cases will be a safe course only if he can successfully meet the following challenges:

- (1) That the variance is "immaterial" or "nonessential."⁴⁹
- (2) That the buyer was able to obtain financing which strictly complied with the contract specifications but rested his efforts to that end prematurely.⁵⁰

⁴⁸ The cases cited at notes 1-5, *supra*, illustrate litigation over a number of these variances.

⁴⁹ *Kovarik v. Vesely*, *supra*, is the only case appearing to rest its approbation of a variance on this ground. It analogizes the problem to that of determining the essentiality of "time of performance" provisions, as dealt with in *Long Investment Co. v. O'Donnel*, cited *supra*, note 19. But is the stipulation of the terms of a condition precedent truly analogous? Modern law may well presume against unintended forfeiture of vested contract rights by over-strict application of the "law day" concept. But where is the parallelism when, because of failure of a condition precedent, no primary contract rights have come into existence? In short, are the "equity of redemption" and "substantial performance" doctrines properly applicable to conditions precedent?

⁵⁰ This is the final point considered in *Kovarik v. Vesely*, at p. 584, which seems to establish a conformity between the performance date of the sale contract itself and the fulfillment date of the financing condition. "... the buyers had no right to rescind the contract prior to the closing date because of inability to secure the \$7,000 mortgage loan." It is questionable whether the buyers asserted any right to *rescind* the contract; their argument was that, after exercise of reasonable diligence on their part, the condition had not occurred, and that, therefore, the prime contract never was enforceable, according to its own terms. What the court may have intended was a rule that, where a contract is subject to a condition precedent but silent as to the time at which occurrence or non-occurrence will be determined, the performance date of the contract is presumed to be the ultimate intended time. But does

(3) That the buyer, by his words or conduct, waived the variance, or estopped himself from showing it.⁵¹

The circumstances which will tend to arise in the average transaction will quite frequently provide a plausible foundation upon which seller may base one or more of these challenges. Consider, for example, that the buyer will ordinarily make application to a given lending institution in much the same general way that Mr. Vesely did in *Kovarik v. Vesely*. The institution will consider the application as conforming (if by its terms it does not literally conform expressly or by reference) to its established current mortgage-loan policies. Should these policies include terms or conditions which do not meet the specifications of the interim contract, the fact of the buyer's application might easily be taken, as it was taken in the Kovarik decision, to bind the buyer to those terms or conditions, superceding the contract to that

not this confuse the "precedent" aspect of the condition? Ordinarily, in practice, when the parties expressly fix such ultimate time for procurement of financing, it is set well in advance of closing; indeed, the parties are anxious to discover, as promptly as possible, whether or not they have a sale. The court seems to meld the condition into the contract itself, as if it were a thing promised in the same sense that the contractual performances are promised, and at the same time. The true inquiry, in such case, should be whether the purchaser's attempt to procure financing was so unreasonably foreshortened as to impugn his good faith, under all the circumstances. Perhaps Kovarik's effort was prematurely rested in this sense; but, since neither trial nor appellate decisions correctly conceive the issue, no finding on the point was made. See *Couch v. Stewart*, 200 S.W. 2d 642, (Tex. Civ. App. 1947) for an illuminating analysis of the question: "Such an instrument . . . could not become operative as a contract of purchase until the occurrence of the expressly stated condition precedent thereto . . . (The proper inquiry is) whether, by the exercise of reasonable diligence the (buyer) could have arranged a . . . loan . . . within a reasonable length of time." See also *Sorota v. Baskin*, *supra*, note 6.

⁵¹ Waiver of the condition, either in whole or in a particular aspect, has sometimes been described by that term (e.g. *Probst v. Di Giovanni*, *supra*, note 1) and sometimes, under strongly similar circumstances, as estoppel (e.g. *Day v. Kerley*, *supra*, note 1). The estoppel theory seems also to apply in another sense, however, since nonperformance of the implied undertaking to make a good faith effort to procure financing seems to operate fundamentally as an estoppel. The principle is variously stated. "A party to a contract may not insist upon a condition precedent where he himself has caused or brought about its nonperformance." *Meyer v. Custom Manor Homes*, 167 N.Y.S. 2d 112, 4 App. Div. 2d 288 (1957). "Where two parties enter into a contract and the consummation of said contract is dependent upon occurrence of a future event, the promisor should do nothing to prevent the occurrence of such future event." *Huckleberry v. Wilson*, *supra*, note 6. The same rule is cited, somewhat out of point, in *George v. Oswald*, *supra*, note 10: "It is a rule of law that one who by mutual contract confers on another a right, or imposes a duty impliedly agrees not to defeat that right or to make impossible the performance of that duty by any affirmative act of his own." See also *Morrison v. Mioton*, *supra*, note 6; and quotation from *Reese v. Walker*, *supra*, note 36. Regardless of the repeated emphasis in the statements of rule upon "affirmative acts," the "inescapable duty" concept announced in *Morrison* seems to require, universally, that the party by whom the financing was intended to be sought should not sit idly by and, by inaction, suffer it not to be procured. However, it is doubtful whether or not the bland assumptions of the court in *George v. Oswald* that, but for the inaction, the contingency of time would have occurred according to its terms, are either valid or necessary. This point is explored under the next heading of the text.

extent.⁵² Any of the three theories above enumerated might be invoked to justify the rule.

To cite another illustration: If dissatisfied with the offered financing, the buyer will most frequently advise the seller or broker of the fact, and declare either that the contract is at an end so far as he is concerned (demanding his down payment), or that "unless we can do something about this" he will be unable to perform. A conversation ensues, in which buyer is urged to "be reasonable" and to "state what will satisfy" him. Responsively, if not cooperatively, the buyer declares a set of financing specifications which, though at some variance with the available plan, is also at variance with the contract details. His ill-considered statements return to haunt him in the ensuing litigation.⁵³

Again, the buyer may object to proposed closing costs which are higher than the maximum prescribed by the contract, though the offered financing in other respects corresponds. Informing the seller of this, and of buyer's intention to utilize the contingency to escape from the deal, the buyer is met by a suggestion that seller and broker will "make up" all or a part of the difference by crediting the price, or in some other fashion. If buyer refuses, he is in danger of running into the same sort of reasoning as controlled the Kovarik case: What difference should this make to a buyer, so long as it isn't costing him any

⁵² In this connection, the problem of oral modification of a contract required to be in writing does not necessarily arise. The financing contingency itself being ordinarily for the benefit of purchaser only (see note 1, *supra*, no modification of the contract, in its bilateral aspect, is involved in a waiver. None of the cases appear to have considered the problem of adequacy of formalities to effect waiver of an express term, in the particular area. Kovarik v. Vesely actually involved an attempted oral modification, by the substitution of vendor-credit for the contractual provision, cash at closing. The unaccepted oral proposal so to modify was enforced by specific performance at the behest of the seller without discussion of the modification issue, although it was urged in the briefs. Under the authorities, the issue is difficult to overlook, RESTATEMENT, CONTRACTS, §223, declares, "For the determination of the question whether a contract to vary a prior contract is within the statute, the second contract is regarded as creating a single new contract consisting of so many of the terms of the prior contract as the parties have not agreed to change, and in addition to the new terms on which they have agreed." By this process, the contract enforced in Kovarik is squarely within the prohibition of the cases cited at footnote 18, *supra*. See also Richardson v. Johnsen, 41 Wis. 100 (1876); Hanson v. Gunderson, 95 Wis. 613, 70 N.W. 827 (1897); Saveland v. Western Wisconsin R. Co., 118 Wis. 267, 95 N.W. 130 (1903); Schaap v. Wolf, 173 Wis. 351, 181 N.W. 214 (1921); Gether v. R. Connor Co., 196 Wis. 25, 219 N.W. 373 (1928); Yasaki, *Oral Alteration of a Written Contract: Expiration, Modification or New Substituted Contract*, 33 Cal. L. Rev. 158 (1956); Annot., Effect of the Statute of Frauds Upon the Right to Modify, By Subsequent Parole Agreement, a Written Contract Required by the Statute to Be in Writing, 17 A.L.R. 10; 2 CORBIN, CONTRACTS, §306-7; 2 WILLISTON, CONTRACTS, §593-4.

⁵³ Day v. Kerley, and Probst v. Di Giovanni, *supra*, note 1, are illustrative. It is a bit difficult to conceive wherein the seller's change of position to justify estoppel enters these cases; but, if the problem is regarded simply as a question of fact respecting purchaser's good faith attempt to procure "suitable" financing, the evidence could well be held competent, bearing in mind the purchaser's right to waive.

more? If he accepts, he waives strict compliance with the contract specifications. If he hesitates—does neither—he simply prolongs his contractual status. If he demands return of his down payment, his action will ordinarily be deemed premature, and a breach of contract. "In any event, the contingency is self-executing."⁵⁴

In so describing the plight of the buyer, it is not intended to suggest that his motives in insisting upon the letter of the contract may not often be an unvarnished attempt to escape his agreement.⁵⁵ It may be conceded that a buyer who thus indulges in petty flyspecking is not ultimately interested in either the money or the principle: he has simply undergone a change of mind or of circumstance respecting the purchase, for which the seller is usually in no way at fault. If the subjective psychological sources of the phenomenon be of interest, they probably could be found to exist in various degrees in high-pressure brokerage practices, over-hasty inspections prior to purchase, the "camel's back" syndrome which accompanies the pre-closing arrangements, and a generous sampling of woman's traditional prerogative.

Not the least of the circumstances tending to induce buyer-defection, however, is the waiting uncertainty of the matter. "We have bought a house and we haven't, and perhaps we will be moving soon." This plaint, all too true of the buyer whose transaction is "subject to financing", can be borne by different people for different periods of time, not always corresponding to the "reasonable time" within which contracts are legally performable. Patience is a virtue not always enforceable by contract, as experience with the marriage contract amply proves.

All of this may seem utterly aside from the question under discussion, but its connection can now be made clear. If the law is to test contingencies of this nature not by whether or not they occurred

⁵⁴ This statement, with which the opinion in Kovarik closed, would imply simply that buyer will generally have no choice but to accept a suggestion of the supposed sort. But the rule itself oversimplifies the practical situation because its application ordinarily involves questions of timing of the suggestion, its basic informality and dubious enforceability, and its frequently tentative nature. Essentially, this situation is a simple variant of Kovarik v. Vesley; but it is also a variant of Savich v. Ruiz, *supra*, note 1, which resulted oppositely.

⁵⁵ See cases cited at note 9, *supra*. What is the relevancy and competency of motive-evidence on this question? Since the ultimate issue of fact is good faith, there is probably a justifiable inference that strong motive to escape the contract would affect the purchaser's diligence in seeking to arrange acceptable financing. But is a purchaser's rejection of offered financing which varies from the contract specification a "bad faith" rejection simply because he has an independent motive for withdrawing from the contract, as was seemingly determined in Fry v. George Elkins Co., *supra*, note 5? Or should the court delve into the question whether the withdrawal from the contract was justified by the motivation-circumstance itself, as seemed to pervade Brandes v. Oram Const. Co., *supra*, note 9? If, in Fry, purchaser's employer had ordered him to Hawaii, would he have been in bad faith in advising his prospective lender to this effect, knowing that such information would probably defeat the loan?

according to their terms, but rather by whether or not they were "material" or "essential", the law will thereby simply heighten the essential uncertainty and doubt which is the central vice of these contracts. If the contracting parties contemplated anything when they entered upon their agreement, they contemplated that the agreement would be executed by conveyance and transfer of possession as promptly as possible, or else would be effectively terminated so that each could enter the market elsewhere. Time, which has so unthinkingly been declared to be not of the essence of these transactions,⁵⁶ is often the greatest single factor in the minds of the parties. The delays consequent upon the law's vacillating determination of uncertain materialities and essences murder the very essence of the transaction.

B. The Burden of Proof

A procedural aspect of the "subject to financing" condition which appears to have received little specific attention in the cases is that in respect to the burden of proof. On which party does it lie, the party seeking to enforce the main contract, or the party seeking to avoid the same on the ground that the condition has not occurred? In short, is unavailability of financing a matter of affirmative defense, which the purchaser (ordinarily) must prove?

the question of good faith. The objective condition itself ordinarily relates to the "ability" of the buyer-borrower to procure the indicated financing. Either expressly or by implication, as heretofore pointed out,⁵⁷ the buyer undertakes to seek such financing "in good faith," or "with due diligence," or "by reasonable efforts." The extent of effort, in terms of numbers of applications, duration of search, etc., which this undertaking calls for could conceivably extend from none whatsoever all the way up to an exhaustive search extending over a span of years. The question whether the requirement of "good faith" was or was not met under given circumstances most frequently becomes the focal point of the entire litigation;⁵⁸ but a point frequently ignored is that the de facto availability of the financing itself is a critical factor in determining the ultimate question—is a factor, indeed, without which the buyer's total absence of diligent search may easily pale into insignificance. For who would contend that a purchase which no reasonable lender would finance, and which was expressly made contingent upon obtaining financing, was enforceable simply because the purchaser was insufficiently energetic in collecting refusals?

Quite obviously, in all cases in which financing was not, in fact, procured, it will involve no little difficulty to prove that it was nevertheless procurable. This is true because of the essentially personal

⁵⁶ *Long Inv. Co. v. O'Donnell*, note 19, *supra*.

⁵⁷ Notes 36 and 51, *supra*.

⁵⁸ *Ibid.* Strangely, however, Kovarik includes no direct mention on the issue.

nature of the transaction. A mortgage loan which would be approved for one applicant might very well be disapproved for another, or approved under more stringent terms; and this despite the identity of the offered security in the two cases. Commercial lenders most commonly submit such applications to a board for approval, and deny to any single individual the power to grant or refuse such an application. This officer or that may be in a position, in certain cases, to give an opinion as to the probable action of his board upon a given application;⁵⁹ but, without such action having been taken in fact, the opinion will usually require careful qualification in the hypothesis upon which it is based.

If, as seems sometimes to have been done,⁶⁰ the purchaser is saddled with the burden of proving unavailability of financing after diligent application therefor, in order to avoid the contract, his proofs can scarcely extend beyond the point of showing as many applications and refusals as possible. The proof of the objective "unavailability" is proof of a universal negative.

But if, on the other hand, the seller seeking to enforce the contract is required to prove that *available* financing was lost due to purchaser's lack of good faith application, the picture acquires a decidedly different hue. The issue now has two facets: 1) Was the type of financing intended by the contingency available upon this purchaser's application, and 2) Was its nonprocurement due to purchaser's failure to exercise good faith efforts to procure it? Regardless of the extent to which proof of the first proposition may tend to prove the second, it must be abundantly clear that proof of the second cannot even anticipate the first, to say nothing of establishing it.

Buyer's lack of diligence, in other words, concludes the issue against him if he has the burden of proof; but does not begin to resolve the issue if seller has that burden.

The near-unanimous consensus of judicial opinion is that the financing contingency in these contracts constitutes a condition precedent (or "suspensive" condition).⁶¹ There seems to be a similar uniformity

⁵⁹ Such testimony was received, and appeared to bear heavily on the result, in *Fry v. George Elkins Co.*, *supra*, note 5. Testimony of the same sort, suggesting that a loan either would or would not have been approved, was evidently present in a number of the other cited cases, but is not directly adverted to. Its competence has not, apparently, been called directly into question.

⁶⁰ *Day v. Kerley*, *supra*, note 1; *Fry v. George Elkins Co.*, *supra*, note 5, where buyer showed that applications to two banks where he was known were refused; *Hannah v. Yanke*, *supra*, note 6, where it appeared that a formal application to a building and loan and an informal inquiry at a bank were both refused; *Schwartz v. Baker*, *supra*, note 4, where purchaser limited his inquiry to FHA-insured loans.

⁶¹ Cases directly so holding include substantially all of those cited in notes 1-10, excepting the distinguished cases at notes 6 and 10. See also, *RESTATEMENT, CONTRACTS*, §250 and 259, making it appear that, if the "subject to financing" clause does not create a condition precedent, it creates an "exception" (if subsequent in form), and has the same general effect. See also 3 *WILLISTON, CONTRACTS*, §666-674.

in the authoritative position that the party who relies upon a contract as the basis of his action or defense has the burden of establishing the fulfillment of conditions precedent expressed therein.⁶² Some authorities, recognizing the occasional difficulties of proof which result from this rule, resolve the issue on the basis of comparative availability of proof, each party being required to prove that fact which is most obviously within his competence.⁶³ But if the ultimate fact be availability of financing, the buyer, with his peculiar knowledge of his own finances, would hardly seem in a better position to prove the ultimate fact than would be the seller, with his peculiar knowledge of the property proposed as security. Neither would have a demonstrable advantage over the other respecting the "tightness" or "looseness" of the money market, nor respecting the current practices or policies of lending institutions. So that the "peculiar knowledge" test, even assuming it to be applicable to contract disputes, would seem to afford little assistance.

The conclusion is that the party relying upon the contract for his cause of action—ordinarily the seller under the interim contract here involved—should be required to prove the buyer's ability to procure the financing involved, and that the failure to obtain it was, in fact, due to buyer's failure to put forth a good faith attempt.

C. Kinds of Evidence; Judicial Notice

As above suggested, the proof of availability of financing will in most instances have to be hypothetical. To the question, "Had this buyer applied to you for sufficient financing to enable him to complete this purchase, would you have made the loan?", the obvious answer is a highly-indefinite "Depends". Any attempt to correlate in a proper hypothetical question all of the myriad factors upon which the answer will depend is ordinarily foredoomed to failure. This is true, of course, only in those cases in which no prospective lender actually did issue a loan commitment, conforming to the terms of the financing contingency, and continue it in force.

Alternatives of dubious validity have been employed. One is to attempt escape from the burden of proving that financing was in fact

⁶² The evidentiary corollary of the determination that the condition is precedent has seldom been discussed directly in "subject to financing" cases. Of Wigmore's three rules, 9 WIGMORE, EVIDENCE, §2486, he indicates that the affirmative allegation rule applies most peculiarly to the case of "a promise alleging non-performance of a contract" (p. 274) Corbin would distinguish the burden of allegation from the burden of proof in "exception" cases, "forcing (defendant) to raise the specific issue on which he chooses to defend . . . but . . . it would seem to be sound policy to make the plaintiff prove his case by a preponderance of the evidence." 3 CORBIN, CONTRACTS, §751, p. 902. See also *ibid.*, §749, p. 895, RESTATEMENT, CONTRACTS, §91 and Williston's comment thereon at 1 WILLISTON, CONTRACTS, §179 would seem unambiguous.

⁶³ Such is Wigmore's third rule, referred to at note 62. Discussions of it appear at 5 Cornell L. Q. 199 and in Laughlin, *Location of the Burden of Persuasion*, 18 U. of Pitt. L. Rev. 3 (1956).

available by proving instead that buyer made no attempt to procure it. This device has been sufficiently analyzed above. Granted that, if the failure to seek financing caused the contract to fail, buyer cannot plead his own wrong in defense; the question remains whether in fact, the stipulated financing was available.

A device sometimes used to satisfy this nagging issue is proof of the common practice of lending institutions in the community with respect to mortgage loans, as going to both the question of the proper construction of the indefinite "subject to financing" clause and to the question of the availability of financing. The "going rate" of interest, the "accepted charges" for mortgage financing, the "standard provisions" of the repayment contract and of the security documents, the "minimum standards" of borrower-acceptability are all terms which are introduced into the controversy. The obvious fact, however, is that in the ordinary case the parties cannot be shown to have contracted with reference to these terms; and that they are consequently (in the absence of judicial fiat) totally irrelevant. The exceptional case is that in which the contract specifies that the intended financing shall qualify for FHA or VA loan repayment guaranty. The various details of such financing are spelled out in the regulations issued by the respective agencies; and, although such regulations establish only partial limitations, they afford a fair and reasonable basis for determining the parties' intention in making their contract "subject to FHA (or VA) financing." The same regulations and practices of the agencies would seem competent to prove, in cases where the lending institution had approved the loan subject to FHA or VA commitment but buyer had failed to apply for such commitment, that the guaranty would (or would not) have been obtained if applied for.

Because, however, the practices of lenders and lending institutions lack the high degree of uniformity which characterize those of the governmental agencies under their published regulations,⁶⁴ the former evidence would seem subject to the objection of irrelevancy.

Perhaps the most high-handed device employed in determining the disputed details of financing and its availability is to take judicial notice of the "common practices" of the community in mortgage financing.⁶⁵ The problem is not so much the very serious one of whether the

⁶⁴ The author is not so naive as to assume in any total sense what is probably an irresistible assumption in a court: that the regulations are written and applied without ambiguity or inconsistency, or that the overall operations of the agencies are any less vacillating than are those of private lenders. But the obvious objective factors (loan amounts, interest rates, charges, loan durations, etc.) are rather definitely prescribed in the government regulations, and are matters of public record in this sense. Government administrators are without power to change or depart from these standards directly.

⁶⁵ RESTATEMENT, CONTRACTS, §245-248 define the legal effect of usage in interpreting contracts. §247: "A usage is operative upon parties to a transaction where and only where

mortgage financing practices of the area are, in fact, matters of common knowledge. More emphatically, it is that "common practices" are neither uniform nor invariable as applied to individual cases. The assumption, therefore, that the contingency under consideration was fulfilled because, in the "common" or "average" case the loan would have been granted on certain terms, is simply *assumptio non probata*. Were the contingency properly susceptible of such interpretation, there would seem to be little point in requiring the buyer to make diligent application for a loan, or in requiring seller to prove fulfillment of the contingency. It would be truly "self executing."

The conclusion is that, in cases in which a loan application was not actually approved in terms conformable to the contract—and, excepting possibly VA and FHA financing, an attempted proof of the condition's fulfillment, without opinion evidence, is probably insufficient—though many of the decisions blandly overlook the point.

IV. PROBLEMS OF APPROPRIATE REMEDY

The law authorizes four basic forms of remedy to parties claiming under land contracts, interim or installment. These are:

(1) The remedies by which the contract is avoided or annulled retroactively, and the parties restored to original positions, as by true rescission.⁶⁶

- (a) they manifest to each other an assent that the usage shall be operative, or
- (b) either party intends the effect of the words or other acts to be governed by the usage, and the other party knows or has reason to know this intention, or
- (c) the usage exists in such transactions and each party knows of the usage or it is generally known by persons under similar circumstances, unless either party knows or has reason to know that the other party has an intention inconsistent with the usage."

Wigmore is to the same effect: There must be either actual knowledge of the usage, or the usage must be so broad that knowledge can be inferred. When inferred, the method of interpretation becomes a question of probabilities of meaning in each case. 9 WIGMORE, EVIDENCE, §2464. 3 WILLISTON, CONTRACTS, §658, distinguishes usage from custom (customary law) and points out that, unlike custom, "Usage . . . need not be 'reasonable', but the more unreasonable it is, the more evidence will be required to establish actual knowledge or duty to know the usage." *Hewitt v. John Week L. Co.*, 77 Wis. 548, 46 N.W. 822 (1890) and *Shores Lumber Co. v. Stitt*, 102 Wis. 450, 78 N.W. 563 (1899) discuss the requirement of actual or constructive knowledge of usage, the latter distinguishing cases where the usage is offered in an attempt to annex an incident not expressed in the contract from those where it is simply offered to explain a doubtful provision of the contract itself. None of the cited authorities appear to suggest that evidence of usage would be competent to prove, in our context, that purchaser's attempt to procure financing would have succeeded had it been more diligently pursued. This seems to represent a substitution of judicial notice of usage, for a critical element of special proof, without, ordinarily, the slightest evidence that the parties either knew or took into account the alleged "common lending practices" when they made their contract "subject to financing."

⁶⁶ Accurately, "rescission" is not a legal remedy at all, in the sense that a court may grant it. It is, properly speaking, a mutual compact of the parties terminating their preexisting contractual obligations to one another. Such compact may exist irrespective of prior breach, and will normally include an adjust-

(2) The remedies by which the contractual status of the parties is terminated, and obligations of further performance discharged, without restoring the parties to their original positions, as by strict foreclosure, action to quiet title, or ejectment.⁶⁷

(3) The remedies by which the nonperforming party is required to perform specifically or to pay damages as substituted performance.⁶⁸

(4) The remedies by which a deposit is declared forfeited, pursuant to a stipulation of liquidated damage.⁶⁹

The last is, of course, but a variant of the ordinary damage action; but it is separately classified here because of its high incidence in interim-contract cases.

When a purchaser fails or refuses to complete his purchase, and

ment of whatever part performances have occurred. A plea of fatal indefiniteness of contract, of illegality, of incapacity, or of the statute of frauds, if successful, effects a parallel type of avoidance. The "right of rescission" which flows from breach of contract is quite different. It terminates the obligation to perform further, if the nondefaulter so elects to treat the breach. *Woodman v. Blue Grass L. Co.*, 125 Wis. 489, 103 N.W. 236 (1905); *Shenners v. Pritchard*, 104 Wis. 287, 80 N.W. 458 (1899); *Pierson v. Dorff*, 198 Wis. 43, 223 N.W. 579 (1929); *Dooley v. Stillson*, 40 R.I. 332, 128 Atl. 217, 52 A.L.R. 1505 (1925).

⁶⁷ Sometimes designated "disaffirming" remedies. *Pierson v. Dorff*, *supra*, note 66, is qualified by *Schwartz v. Syver*, 264 Wis. 526, 59 N.W. 2d 489 (1952), but on another point: the availability of restitution in the face of disaffirmance. *Chartier v. Simon*, 250 Wis. 639, 27 N.W. 2d 751 (1947) seems to approve the ejectment remedy, since legal title remains in vendor. See *Lathrop, The Land Contract Vendee Has Come of Age*, 32 Wis. Bar Bull. 50 (August, 1959). Mr. Lathrop's reference is exclusively to the "installment" contract, however, and his reasoning may be inapplicable to interim arrangements, in which right to possession does not ordinarily pass. The continued distinction in terms of legal effect, between deeds with mortgages-back and installment contracts as methods of vendor-financing is, as Mr. Lathrop suggests, difficult to justify.

⁶⁸ The specific performance remedy, as applied to sellers, was approved in *Heins v. Thompson & Flieth L. Co.*, 165 Wis. 563, 163 N.W. 173 (1917), as a matter of right under what seem to be ordinary circumstances, and not as a matter of discretion. No detailed discussion of the merits or demerits of the rule there announced has appeared in Wisconsin cases since, the right of vendor to such remedy having apparently been taken for granted. *Cf. Walter v. Hoffman*, 267 N.Y. 365, 196 N.E. 291, 101 A.L.R. 919 (1935), suggesting that the question is less one of blind "mutuality of remedy" than one of adequacy of remedy at law. *RESTATEMENT, CONTRACTS*, §372-3 are vague on the point taken together. Interesting discussions of the doctrine are Thomas, *The Inequity of Mutuality of Remedy*, 2 Baylor L. Rev. 54 (1949) and Dozier, "The California Doctrine of Mutuality in Suits for Specific Performance," 28 Cal. L. Rev. 492 (1940). The latter suggests that the question whether the positive applications of the doctrine are proper is unimportant, in view of the vendor's right to proceed on the debt (note) at law, and foreclose his vendor's lien. Presumably the remedy at law in Wisconsin is similarly unrestricted to damages. *1st Nat'l Bank of Sparta v. Agnew*, 45 Wis. 131 (1878); *Oconto County v. Bacon*, 181 Wis. 538, 195 N.W. 412 (1923).

⁶⁹ After *Long Inv. Co. v. O'Donnel*, *supra*, note 19, it would appear that provisions for optional liquidation of damages in the customary form are not operative simply by silence, since there is no "essential" time at which the provision is operative, absent an express or implied notice to buyer of seller's election to exercise his rights under the clause. The unusual circumstance of the case, the liquidated amount being less than the "earnest money" in seller's hands, may serve as a ground of distinction in future litigation, however.

when a negotiated settlement of the contract fails of accomplishment, the purchaser's only immediate concern is recovery of his down payment money, ordinarily held in escrow by the broker. He supposes that such recovery is all that stands between him and his final escape from the transaction.

Against this fund, however, two claims clamor for payment: the broker's claim for commission and the seller's claim for damages. If the financing contingency of the contract does not, by reason of indefiniteness of statement, itself avoid the agreement, its nonfulfillment will produce that effect; and the seller's claim certainly, the broker's probably, will be avoided.

If, on the other hand, the contingency has been "essentially" or "substantially" fulfilled, or if it has been waived, or if buyer is estopped to show its nonfulfillment, then the buyer's claim against the fund is reduced to the rather dubious status of an unjust enrichment claim against the seller;⁷⁰ and seller and broker distribute the fund between themselves as per their contract, broker first, seller second.

The buyer's assumption, however, that his possible loss is confined to the escrow deposit is false; and one of which his attorney should promptly disabuse him. Failing to escape the contract under the financing contingency, buyer may be subject to substantial damages in addition to loss of this deposit.

In consequence, there is added to the buyer's legal uncertainty respecting the recoverability of his deposit a further uncertainty respecting his additional liability. Should he be proceeded against in law, for ordinary contract damages, he faces the prospect of paying a judgment based on the formula: contract price minus fair market value of property at time of breach minus deposit.⁷¹ In circumstances in which the value of the property is fairly stable, and in which the property was not too badly overpriced, this formula will yield no net recovery to the seller. The significant circumstance which bears heavily on the advisability of this remedy in "subject to financing" cases is that, to establish availability of the financing, the seller must establish an adequate security-value in the property itself. This process will tend to defeat the seller's attempt to establish a low market value under the formula.

But the acute lawyer, representing the seller in such situations, will

⁷⁰ *Schwartz v. Syver*, *supra*, note 67. The authorities cited in support of the doctrine suggest a limitation of its availability which would seem even more insurmountable in most cases than the difficult burden of proof which the case places upon the buyer: the fact that the relief is not decreed against a seller in position to specifically perform. Unless vendor has resold the premises, therefore, buyer's right to restitution seems tenuous. See, esp. Corbin, *The Right of a Defaulting Vendee to the Restitution of Instalments Paid*, 40 *Yale L.J.* 1013 (1931).

⁷¹ *Pierson v. Dorff*, *supra*, note 66.

elect a different remedy: that of specific performance. The sole drawback of this course, assuming a financially responsible buyer, is that the resale of the property is necessarily postponed *pendente lite*. That problem, however, may be present regardless of the form of action selected, assuming inability to negotiate settlement of the dispute, so that it constitutes no insuperable objection.

The most important practical advantage gained by proceeding in specific performance is that it enables seller to separate his proofs on the question of security-value from those on the question of fair market value, and effectively shifts the burden on the latter question. In addition, seller places himself in a position to recover the "demurrage" on the property (taxes, interest, insurance upkeep, heating, repairs etc.) over and above the basic contract debt.

The procedure is this: Seller commences suit praying that buyer be required specifically to perform by paying the balance of purchase price, plus demurrage, and alleging that, upon such payment, seller will himself perform by conveyance. Buyer's most usual answering plea sets up the contingency. This plea failing, judgment is entered for the full balance due on the contract, ordering payment within a reasonable period, and directing that, unless such amount is paid as ordered, the subject property (treated as equitably belonging to the buyer) be advertised and sold at equitable foreclosure sale to meet the judgment.⁷² To this point, the only question which has arisen respecting the value of the property is that respecting its security value, in connection with the availability of financing, and the seller's position is that such value was—at time of breach—adequate.

Subsequently, the foreclosure auction is held. Prominent among the bidders, and going as high as he must, is the seller-plaintiff. Following the auction, the matter comes back into court for confirmation—and determination of deficiency.⁷³ If defendant-buyer intends now to defeat or lessen the impending deficiency, he has the burden of showing that the auction *did not* realize fair market value, against the presumption that it did.⁷⁴ The inquiry now is not concerned with fair market at time of breach, but with fair market at time of sale; and opinion evidence offered on behalf of buyer is ranked against the fact of the open public auction sale.

The court's alternatives, even assuming its dissatisfaction with the

⁷² *Heins v. Thompson & Flieth L. Co.*, *supra*, note 68. The procedure should be carefully distinguished from that followed in mortgage foreclosures, under Ch 278, Wis. Stats. The provisions of Ch. 281, Wis. Stats., governing the procedure, are sketchy at best; and the matter is largely governed by judicial custom.

⁷³ *Heins v. Thompson & Flieth L. Co.*, *supra*, note 68. "... in practice, payment of the purchase money is, probably, generally enforced by the sale of the land to satisfy the amount due for purchase money and costs, and a judgment for the deficiency, if any, enforceable by execution." p. 572.

⁷⁴ *Griswold v. Barden*, 146 Wis. 35, 130 N.W. 952 (1911).

bid, are limited: it may present plaintiff-seller with an option to reduce or waive his deficiency or submit to a resale; it may order resale, including an upset price; or it may simply order a resale.⁷⁵ Meanwhile, the costs and demurrages continue to run against the buyer's account. Ultimately, he must either purchase or go bankrupt. If the necessary financing is in fact unavailable (regardless of the legal finding on the point), the buyer's only course is bankruptcy. The credit purchase which buyer originally contracted to make has been converted into a present cash liability.

The sceptre of this outcome will discipline many purchasers to hazard either the action or the appeal undertaken by the buyer in *Kovarík v. Vesely*. The risk of loss is entirely disproportionate to the possibility of gain by recovery of the deposit money. The innocent-appearing and obscure words, "subject to financing", have evolved into a monster.

Whatever may be said for or against the construction which the courts have placed upon the clause itself, it would seem that the practice of granting specific performance on seller's plea in such cases is inequitable and unwarranted.⁷⁶ No rule is better supported by authority than is the rule that equity will not enforce a contract which is doubtful and unclear in its terms. In the sense of this rule, a degree of clarity substantially in excess of that required for legal enforceability has been consistently required.⁷⁷

It can scarcely be gainsaid that "subject to financing" contracts are tentative and unsettled in their inception. By definition, they are contingent; and in the vast majority of cases, the precise meaning of the contingency is lost in a cloud of doubts. Only in clear cases can the finding that the contingency was satisfied so far as "material" be made without substantial doubt, regardless of whether or not it is "against the great weight and clear preponderance of the evidence."⁷⁸ To permit the invocation by seller of the equitable powers of the court against this background seems improper.

More especially is this true when we consider that the contract which is specifically enforced under the decree is essentially unlike the one which the parties originally entered into. Buyer and seller both envisioned the necessity of third-party financing as the sine qua non of the transaction. It is inconceivable that buyer would have entered into the transaction at all had it been put to him as a cash proposition, with

⁷⁵ The rule is set forth in *Suring State Bank v. Giese*, 210 Wis. 489, 246 N.W. 556 (1933) with respect to mortgage foreclosures. Presumably, the same basic equitable considerations apply to the land contract suit.

⁷⁶ Note 68, *supra*.

⁷⁷ *Schmeling v. Kriesel*, 45 Wis. 325 (1878); *Park v. M., St. P. & S.S.M. R. Co.*, 114 Wis. 347, 89 N.W. 532 (1902); *RESTATEMENT, CONTRACTS*, §370; 5 *WILLISTON, CONTRACTS*, §1424, p. 3986.

⁷⁸ The latter standard was employed in *Kovarík v. Vesely*, *supra*, note 27, in affirming trial court's finding respecting "immateriality" of the loan-source provisions, in support of specific performance at seller's behest.

the money to come from his own assets. Even assuming that the buyer's failure to procure the financing and to complete the purchase was entirely deliberate, the hard fact of the matter is that equity cannot, after the event, restore the availability of such financing so that the purchase may proceed essentially as per contract.⁷⁹ Its decree of specific performance, under such circumstances, amounts realistically to a hollow gesture, stripping the contract of its most vital provision.

The only apparent reason advanced for allowing the remedy to the seller is because, had seller defaulted, the same remedy would have been available to the buyer.⁸⁰ This reasoning constitutes an affirmative application of the doctrine of mutuality of remedy—a doctrine which has never possessed any but the haziest logical support, and one which, at least in its affirmative applications, has been thoroughly discredited.⁸¹ In plain fact, the seller's action for specific performance is nothing but a debt-collection device; and no reason has ever been suggested why the legal remedy is inadequate for those purposes.⁸² Indeed, once the specific performance decree has worked its tactical magic by dispensing the seller from proving his legal damage, all aspects of its equitable nature disappear, and the debt collection proceeds by ordinary legal processes.⁸³

Pursuing the mutuality concept a bit further, however, we find a common practice of attempting to block, by contract, even the buyer's well-established right of specific performance upon seller's attempted default. By insertion of the customary avoidance clause, the standard interim contract provides that should seller fail to make title as he undertakes to do, and buyer is unwilling to waive the default, the agree-

⁷⁹ "The court took the position that courts of equity endeavor to enforce specific performance of agreements for sale of land, and therefore was justified in changing the agreement to make the same possible to perform. . . . We are of the opinion that the court went beyond sound discretion in its decree in this case," *Degheri v. Carobine*, 102 N.J. Eq. 264, 140 Atl. 406 (1928).

⁸⁰ Note 68, *supra*.

⁸¹ *Ibid.* The logical separation of affirmative and negative applications of the doctrine requires a feat of mental gymnastics, but is most easily understood as a technique for avoiding the usual requirements for invocation of equity. If a petitioner for specific performance can show no grounds for equitable relief on his own account, he pleads the rule. Likewise, if one resisting the petition cannot disprove petitioner's grounds for equitable relief, he invokes the negative rule. Since a seller, unable by reasonable measures to remove clouds, incumbrances, or other title defects, may resist specific performance (see "Specific Performance of Land Contract Where Vendor Will Be Compelled to Acquire, or Incur Expense in Clearing Title," 171 A.L.R. 1299), should not the negative application of the rule deny the relief on seller's petition? The rule itself prompts the dog to chase its tail.

⁸² Quite the contrary. The most telling argument in favor of granting specific performance to the seller is that it is the practical equivalent of the legal remedy. See Dozier, *supra*, note 68.

⁸³ "Otherwise . . . such enforcement (contempt) might be contrary to the policy of our system." *Heins v. Thompson & Flieth L. Co.*, *supra*, note 68, p. 572. The reference is clearly to the constitutional imprisonment for debt prohibition.

ment shall be null and void.⁸⁴ Not even a damage action is allowed buyer, to say nothing of specific performance.⁸⁵ Under this common form of contract, therefore, not even the mutuality doctrine seems applicable to permit seller's action.

V. CONCLUSIONS

The real estate purchase or sale is, in many or most cases, the largest single purchase or sale upon which the average man enters in his lifetime, and most commonly involves the longest-term liability and planning. He will deliberate at length and consult technical or professional advisers before purchasing an automobile or signing a will; he will often see his attorney before accepting a simple warranty deed, preparation of which is hardly more than ministerial.⁸⁶ But he will enter upon the real estate transaction with no greater attention to the details of the matter than a commission-seeking broker happens to afford.

Practical considerations, aside from an unseemly anxiety to fast-sell the property, may arguably require that some form of tentative agreement bridge the time interval between initial decision and procurement of financing. The property can scarcely remain on the market, unless the ordinary merchantile principle of "first come, first served" is to be followed (and in most cases, there appears little real reason why it should not be).⁸⁷ But, of all the conceivable devices for bridging this interval, from gentlemen's agreement on up, the "subject to financing" clause as commonly used, vague as to detail, indefinite in duration,

⁸⁴ The clause has been variously interpreted. *Old Colony Trust Co. v. Chauncey*, 214 Mass. 271, 101 N.E. 423 (1913) held: "This clause means that if it turns out that without fault on the part of the defendants subsequent to the execution of the contract they have a defective title, then, after refunding payments made, all obligations of both parties shall cease." However, "the tenor of the contract does not require the extinguishment of outstanding defects." Cf. cases cited in annotation, *supra*, note 81; *Douglas v. Ransom*, 198 Wis. 445, 224 N.W. 473 (1929). See also *Moskow v. Burke*, 255 Mass. 563 (1926); *N.Y. N.H. & H. R. Co. v. Butter*, 276 Mass. 236, 176 N.E. 797 (1931). If vendor does not covenant his title, what does he covenant?

⁸⁵ *Ibid.*

⁸⁶ The emphatic insistence by many Unauthorized Practice committees that drafting a deed constitutes practice of law, while apparently conceding that drafting a contract for deed does not, seems a bit absurd.

⁸⁷ A procedure pregnant with interesting possibilities is that lately adopted by a large Wisconsin brokerage in cases where the interim contract is subject to resale of purchaser's residence. The agreements provide that seller will continue to hold his property on the market, and that, on receipt by seller and notice to buyer of a subsequent offer, buyer will have 48 hours within which to waive the condition or lose his right to purchase. The clause is, to date, untested in court. The only difficulties which it may engender are 1) a reluctance of the broker to exert aggressive effort toward finding a second purchaser of the same premises, placing the broker in an embarrassing conflict of interests and 2) a reluctance of subsequent purchasers to risk the unassailability of the forfeiture aspects of the clause. Where the first purchaser can be induced to quitclaim, the latter problem is solved. The adaptability of the device to the financing contingency offers an interesting speculation.

literally if not legally incomprehensible as to meaning, and often vicious as to consequences both to buyer and seller, is probably the worst.

Regarding the matter simply from the standpoint of the seller's advantage, if he is to remove his property from the market and hold it for possible purchase by the buyer, the option contract offers precision of terms and of duration, and a consideration which can be enforced, if the purchase is not concluded, without running afoul of the law of forfeiture or involvements in vague principles of unjust enrichment.⁸⁸

From the purchaser's standpoint, the option creates an indisputable first right to buy, limits potential loss to the amount paid for the option, puts a specific time limit on the uncertainty of the transaction, and avoids the potential dire consequences of risking all in an attempt to prove nonfulfillment of a financing contingency, as his sole defense to a specific performance action.

The argument is that buyers will refuse to pay for options, if not solidly confident of their ability to finance; and that sellers will not give options except for substantial consideration, without present assurance that buyers actually will buy. The reply is that sellers now give for nothing what are effectively options, without assurance that buyers actually will buy; and that buyers risk in deposits (and often lose, by negotiation or by litigation) far more substantial sums than they would be called upon to pay for equivalent options.⁸⁹

Both parties, however, have a stake in the ultimate consideration: the essential importance, both economically and psychologically, of time. The pressure of weeks, months and years spent in uncertainty, with the mounting expenses of idle property surcharged by legal and court costs and charges, is a casualty against which a negotiated option-price would be cheap insurance.

Minds may differ on the question whether a "subject to financing" clause should be construed favorably to or against the validity of the contract, whether burdens of proof should lie here or there, and whether this remedy or that is appropriately granted. So long as this state of doubt and disagreement remains the legal atmosphere in which these clauses must operate, it would seem to behoove brokers, attorneys and parties to avoid such clauses as they would a plague. Legislation to that end, reminiscent of the old "lightning rod" and "stallion" provisions of the negotiable instruments law, would not seem unwarranted.

Failing this, it would seem that judicial policy should be inclined strongly to disfavor such contracts.

⁸⁸ Corbin's article, cited *supra*, note 70, clearly contrasts the option in these respects.

⁸⁹ There appears to be no economic science by which the fair value of an option can be appraised. Presumably, however, a relatively short-term option should be procurable for substantially less than the 5-10% of purchase price now customarily demanded as "earnest money." One per cent would be nearer the mark, if a 30-day option were involved.